

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SECURITIES AND EXCHANGE) C-23-06003 WHO
COMMISSION,)
) SAN FRANCISCO, CALIFORNIA
PLAINTIFF,)
) JANUARY 8, 2025
VS.)
) PAGES 1-27
PAYWARD, INC., AND PAYWARD)
VENTURES, INC.,)
)
DEFENDANTS.)
_____)

TRANSCRIPT OF ZOOM PROCEEDINGS
BEFORE THE HONORABLE WILLIAM H. ORRICK
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: U.S. SECURITIES AND EXCHANGE COMMISSION
BY: PETER B. MOORES
33 ARCH STREET, 24TH FLOOR
BOSTON, MASSACHUSETTS 02110

BY: ALEC JOHNSON
444 SOUTH FLOWER STREET, SUITE 900
LOS ANGELES, CALIFORNIA 90071

APPEARANCES CONTINUED ON THE NEXT PAGE

OFFICIAL COURT REPORTER: LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

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APPEARANCES (CONTINUED)

FOR THE DEFENDANTS: CLEARY GOTTlieb STEEN & HAMILTON
BY: SAMUEL LEVANDER
ONE LIBERTY PLAZA
NEW YORK, NEW YORK 10006

BY: MATTHEW C. SOLOMON
2112 PENNSYLVANIA AVENUE
WASHINGTON, D.C. 20037

WAYMAKER LLP
BY: BRIAN KLEIN
515 SOUTH FLOWER STREET, SUITE 3500
LOS ANGELES, CALIFORNIA 90071

1 SAN FRANCISCO, CALIFORNIA

JANUARY 8, 2025

2 P R O C E E D I N G S

3 (ZOOM PROCEEDINGS CONVENED AT 2:00 P.M.)

4 THE CLERK: ALL RIGHT. WE WILL GET UNDERWAY IN CASE
5 NUMBER 23-6003, SECURITIES AND EXCHANGE COMMISSION VERSUS
6 PAYWARD, INCORPORATED.

7 COUNSEL, IF YOU WOULD PLEASE STATE YOUR APPEARANCE FOR THE
8 RECORD.

9 MR. MOORES: THIS IS PETER MOORES ON BEHALF OF THE
10 SECURITIES AND EXCHANGE COMMISSION.

11 MR. JOHNSON: THIS IS ALEC JOHNSON ON BEHALF OF THE
12 SECURITIES AND EXCHANGE COMMISSION.

13 MR. LEVANDER: SAMUEL LEVANDER, CLEARLY GOTTLIEB
14 STEEN & HAMILTON FOR DEFENDANTS PAYWARD INC. AND
15 PAYWARD VENTURES, INC.

16 MR. SOLOMON: AND MATTHEW SOLOMON FROM CLEARY
17 GOTTLIEB ON BEHALF OF DEFENDANTS PAYWARD INC. AND
18 PAYWARD VENTURES, INC.

19 MR. KLEIN: AND BRIAN KLEIN ON BEHALF OF THE SAME
20 DEFENDANTS.

21 THE COURT: ALL RIGHT. GOOD AFTERNOON TO EVERYBODY.
22 SO LET ME TELL YOU WHAT I'M THINKING. I THINK I DO HAVE
23 DISCRETION TO ADDRESS THE SEC'S MOTION FOR JUDGMENT ON THE
24 PLEADINGS ON THE AFFIRMATIVE DEFENSES.

25 AND THESE ARE UNUSUAL AFFIRMATIVE DEFENSES. I THINK THESE

1 ISSUES ARE USUALLY BROUGHT AS PART OF BROADER ARGUMENTS.

2 BUT WITH RESPECT TO THE MAJOR QUESTION ISSUE, I THINK I
3 HAVE DEALT WITH THAT. THAT DOESN'T MEAN THAT, TWO YEARS DOWN
4 THE ROAD, IF THE SITUATION WARRANTS IT BECAUSE THE CONTEXT HAS
5 CHANGED OR THERE'S SOME REAL REASON THAT I WOULD BE -- YOU
6 THINK I'D BE LIKELY TO CHANGE MY MIND, YOU CAN BRING IT UP
7 AGAIN AS A MOTION TO RECONSIDER.

8 BUT I THINK AT THIS POINT, THE AFFIRMATIVE DEFENSE IS OUT
9 AND DETERMINED.

10 WITH RESPECT TO THE NINTH AND TENTH AFFIRMATIVE DEFENSES,
11 I DON'T THINK THE JUDGMENT ON THE PLEADINGS MOTION IS THE RIGHT
12 VEHICLE FOR THIS. I DO THINK THAT THE DEFENDANT IS ENTITLED TO
13 PRESENT THEIR BEST CASE ON THE ISSUES.

14 I'M NOT CONVINCED THAT THEY HAVEN'T ALREADY DONE THAT, AND
15 I'LL BE INTERESTED IN HEARING FROM THE DEFENDANTS ON THAT.

16 I'M NOT GOING TO ALLOW THE DEFENDANTS TO RUMMAGE AROUND IN
17 THE INTERNAL DELIBERATIONS OF THE SEC ON WHY IT'S DONE WHAT
18 IT'S DONE.

19 BUT YOU DO HAVE THE THINGS THAT ARE OUT IN THE PUBLIC,
20 YOU'VE SOUGHT JUDICIAL NOTICE, AND I THINK JUDICIAL NOTICE
21 WOULD WORK FOR THINGS IN THE PUBLIC.

22 AND SO THE QUESTION IS, HAVE -- IS THERE MORE THAT YOU
23 THINK IS OUT THERE, OR WOULD YOU LIKE TO PRESENT THE ISSUE IN A
24 DIFFERENT WAY THAT PRESERVES -- THAT DOES THE BEST JOB FOR YOU,
25 AND IN THE OFF CHANCE THAT IT'S NOT SUCCESSFUL, PRESERVE ANY

1 ISSUE FOR APPEAL?

2 SO THAT'S REALLY WHAT I'M THINKING. NO DISCOVERY, BUT
3 ALLOWING THE AFFIRMATIVE DEFENSES TO REMAIN.

4 SO LET ME HEAR FROM THE DEFENDANTS FIRST.

5 MR. LEVANDER: SURE. THANK YOU, YOUR HONOR. AGAIN,
6 SAM LEVANDER FROM CLEARY ON BEHALF OF THE DEFENDANTS. I'LL
7 TAKE ON THE ISSUES IN THE ORDER THAT YOU RAISED THEM.

8 SO I GUESS FIRST, VERY QUICKLY, ON THE QUESTION OF
9 TIMELINESS, WE DON'T DISAGREE THAT YOUR HONOR HAS THE
10 DISCRETION UNDER 12(F).

11 HOWEVER, THE SEC HASN'T PRESENTED HERE ANY GOOD REASON
12 WHY, WHY THAT DISCRETION SHOULD BE AFFORDED TO IT,
13 UNDERSTANDING THAT OF COURSE THE COURT HAS DISCRETION AND
14 SHOULD EXERCISE THAT DISCRETION AS IT SEES FIT.

15 BUT THE SEC HASN'T EXCUSED WHY THIS MOTION WAS FILED AFTER
16 THE 21 DAY DEADLINE.

17 I'M HAPPY TO LEAVE THAT POINT THERE.

18 THE COURT: I WOULD LEAVE THAT ALONE. I USED TO
19 PRACTICE LAW, SO I REMEMBER FILING MOTIONS FOR JUDGMENT ON THE
20 PLEADINGS WELL AFTER THE TIME THAT MY LEARNED COLLEAGUES
21 THOUGHT WAS APPROPRIATE UNDER THE RULES.

22 BUT JUDGMENT ON THE PLEADINGS ALLOWS YOU TO DO IT, SO GO
23 ON TO THE NEXT ONE.

24 MR. LEVANDER: SURE.

25 SO THEN I'LL TURN TO MAJOR QUESTIONS, AND I THINK THERE

1 THE KEY, THE KEY POINT IS THAT WE CERTAINLY ACKNOWLEDGE THAT
2 YOUR HONOR HAS ADDRESSED THE MAJOR QUESTIONS DOCTRINE IN THE
3 MOTION TO DISMISS ORDER.

4 BUT AT THE MOTION TO DISMISS STAGE, WHAT -- THE COURT DID,
5 OF COURSE, WHAT THE STANDARD THERE REQUIRED, WHICH IS TO ACCEPT
6 ALL THE SEC'S PLEADED FACTS AS TRUE AND MAKE ALL INFERENCES IN
7 THE SEC'S FAVOR.

8 AND THERE THE COURT, RIGHT, THE COURT HELD THAT THE ANSWER
9 WAS THAT THIS WAS NOT SOMETHING THAT WAS SUBJECT TO THE MAJOR
10 QUESTIONS DOCTRINE.

11 HOWEVER, AT SUMMARY JUDGMENT, RIGHT, KRAKEN CAN RELY ON
12 DOCUMENTS FROM THE SEC AND FROM THIRD PARTIES, TESTIMONY AND
13 EXPERT DISCOVERY THAT SHOWS THAT THE FACTS ARE NOT AS THE SEC
14 ALLEGED THEM IN THEIR COMPLAINT.

15 AND AT THIS STAGE IN THIS MOTION, THE COURT NEEDS TO
16 MAKE -- NEEDS TO ACCEPT ALL OF KRAKEN'S PLEADED FACTS AS TRUE
17 AND MAKE ALL INFERENCES IN KRAKEN'S FAVOR.

18 SO JUST TO GIVE, TO GIVE ONE EXAMPLE, IN THE SUPREME
19 COURT'S DECISION IN BIDEN V. NEBRASKA, THE SUPREME COURT RELIED
20 ON A REPORT THAT SAID THAT THE PROPOSED STUDENT LOAN
21 FORGIVENESS PROGRAM WOULD COST TAXPAYERS AROUND \$500 BILLION,
22 AND IN RELYING ON THAT REPORT, THE COURT -- THE COURT HELD THAT
23 THE PROGRAM HAD STAGGERING ECONOMIC AND POLITICAL SIGNIFICANCE.

24 AND SO SIMILARLY HERE, KRAKEN SHOULD HAVE THE OPPORTUNITY
25 TO DEVELOP EXPERT AND FACT EVIDENCE THAT SHOWS THAT THE DIGITAL

1 ASSET INDUSTRY AND THE SEC'S REGULATION OF IT HAVE ECONOMIC AND
2 POLITICAL SIGNIFICANCE.

3 SO THAT'S SOMETHING -- WE THINK THAT THE -- EVEN THOUGH
4 ACKNOWLEDGING THE IMPORT OF THE MOTION TO DISMISS DECISION,
5 THAT THE PROCEDURAL POSTURE IS DIFFERENT HERE AND THAT WE
6 SHOULD HAVE AN OPPORTUNITY TO DEVELOP THE RECORD FOR SUMMARY
7 JUDGMENT AND THAT THERE IS SOME POSSIBILITY IN TERMS OF FACTS
8 THAT COULD BE DEVELOPED THAT COULD SAVE THIS DEFENSE GOING
9 FORWARD AND ULTIMATELY REQUIRE A DIFFERENT RESULT THAN WHAT WAS
10 REACHED AT THE MOTION TO DISMISS STAGE.

11 THE COURT: SO CAN'T YOU DO THE SAME THING THROUGH A
12 MOTION FOR RECONSIDERATION?

13 MY RULING ON THIS -- MY THINKING WAS BROADER THAN JUST
14 WHAT'S IN THE COMPLAINT, AND I TRIED TO EXPRESS THAT, I THINK,
15 IN THE ORDER. IT MAY BE THAT YOU'VE GOT A -- THAT -- IT MAY BE
16 THAT THE SITUATIONS WILL HAVE CHANGED, THE CONTEXT WILL HAVE
17 CHANGED. I IMAGINE THAT WE'RE GOING TO SEE A WHOLE LOT OF
18 CHANGE IN THIS INDUSTRY DURING THE TIME OF THIS CASE, AND I'M
19 NOT FORECLOSING THE POSSIBILITY OF BRINGING IT BACK BECAUSE I
20 THINK THE MAJOR QUESTIONS DOCTRINE IS SOMETHING THAT YOU ALSO
21 CAN RAISE AT ANY TIME, AND I'M NOT SURE THAT I THINK -- I GUESS
22 IT'S NICE TO HAVE RAISED IT AS AN AFFIRMATIVE DEFENSE, BUT I'M
23 NOT SURE THAT IT'S EVEN REQUIRED AS AN AFFIRMATIVE DEFENSE. I
24 THINK IT'S JUST ONE OF THOSE EQUITABLE PRINCIPLES THAT CAN BE
25 ADDRESSED -- CAN BE RAISED AND ADDRESSED AT ANY TIME IN A CASE.

1 MR. LEVANDER: SO CERTAINLY WE AGREE WITH YOUR HONOR
2 THAT WE SHOULD BE ABLE TO BRING IT -- TRY TO BRING IT BACK
3 IF -- YOU KNOW, ALLEGING THAT THE CIRCUMSTANCES HAVE CHANGED.

4 BUT I THINK IN TERMS OF -- IN TERMS OF AT THE DISCOVERY
5 STAGE, WE THINK IT'S IMPORTANT TO BE ABLE TO DEVELOP THE
6 FACTUAL RECORD TO SUPPORT, TO SUPPORT OUR ARGUMENT ON THE MAJOR
7 QUESTIONS DOCTRINE, AND THAT IT SHOULD BE SORT OF LIVE FOR
8 PURPOSES OF DISCOVERY.

9 THE COURT: OKAY. GO ON TO THE NEXT ARGUMENT.

10 MR. LEVANDER: OKAY.

11 SO THEN AS TO FAIR NOTICE, SO THE NINTH AND TENTH
12 DEFENSES, SO WE AGREE WITH YOU THAT THIS IS NOT APPROPRIATE FOR
13 RESOLUTION ON A 12(C) -- ON A 12(C) MOTION AND THAT -- YEAH, SO
14 WE AGREE WITH THAT SORT OF HIGH LEVEL PRINCIPLE.

15 AND I THINK THAT THE KEY QUESTION THAT YOUR HONOR ASKS --
16 AND TELL ME IF I'VE GOT THIS INCORRECT -- WAS SORT OF, IS THERE
17 MORE SORT OF BEYOND SORT OF WHAT'S OUT THERE IN THE PUBLIC
18 RECORD ALREADY THAT WE THINK IS RELEVANT TO THIS DEFENSE?

19 AND THE ANSWER TO THAT QUESTION IS DEFINITELY YES.

20 SO ON THE QUESTION OF FAIR NOTICE, THERE CERTAINLY IS A
21 LOT THAT WE'VE POINTED OUT THAT WE'VE SOUGHT JUDICIAL NOTICE OF
22 FOR PURPOSES OF THIS MOTION THAT DOES COME FROM THE PUBLIC
23 RECORD.

24 HOWEVER, THERE DEFINITELY ARE DOCUMENTS THAT GO BEYOND THE
25 PUBLIC RECORD THAT WE THINK WOULD BE RELEVANT HERE.

1 SO, FOR EXAMPLE, THERE ARE FACTUAL DISPUTES IN THIS CASE
2 AROUND, FOR EXAMPLE, WHETHER A PATH TO REGISTRATION WAS
3 POSSIBLE FOR A DIGITAL ASSET TRADING PLATFORM LIKE OUR CLIENT.

4 WE SAY THAT IT WAS NOT POSSIBLE. THE SEC'S POSITION IS
5 THAT THERE WAS A PATH TO REGISTRATION AND KRAKEN FAILED TO DO
6 SO.

7 AND ANOTHER EXAMPLE OF A DISPUTED FACT IN THIS CASE IS THE
8 CHARACTERIZATION OF WHEN CHAIR GENSLER TOLD CONGRESS AND
9 SENATOR WARREN THAT THERE WAS NO REGULATORY FRAMEWORK AT THE
10 TIME FOR DIGITAL ASSET TRADING PLATFORMS.

11 SO JUST LOOKING AT THOSE TWO FACTUAL QUESTIONS, FOR
12 EXAMPLE, THERE ARE A NUMBER OF DIFFERENT AVENUES OF DISCOVERY
13 FOR DOCUMENTS SORT OF OUTSIDE OF WHAT'S ALREADY IN THE PUBLIC
14 RECORD THAT WOULD BE RELEVANT TO THOSE QUESTIONS.

15 THE FIRST CATEGORY WOULD BE THE SEC'S COMMUNICATIONS WITH
16 KRAKEN'S COMPETITORS AND OTHER THIRD PARTIES ABOUT THE
17 REGULATION AND REGISTRATION OF DIGITAL ASSET TRADING PLATFORMS.

18 SO THESE ARE NOT INTERNAL COMMUNICATIONS. I UNDERSTAND,
19 TO YOUR HONOR'S POINT, ABOUT NOT RUMMAGING AROUND SORT OF IN
20 DOCUMENTS THAT RAISE DELIBERATIVE PROCESS PRIVILEGE CONCERNS.

21 BUT ANY COMMUNICATION THAT THE SEC WAS HAVING WITH, FOR
22 EXAMPLE, ONE OF KRAKEN'S COMPETITORS OR OTHER THIRD PARTIES,
23 THOSE WOULD NOT BE SUBJECT TO ANY DELIBERATIVE PROCESS
24 PRIVILEGE, AND WE THINK THOSE WOULD BE CLEARLY DISCOVERABLE
25 DOCUMENTS, AND ALSO GO SORT OF TO THE HEART OF THE FAIR NOTICE

1 QUESTIONS IN THIS CASE.

2 THE SECOND CATEGORY WOULD BE THE SEC'S COMMUNICATIONS WITH
3 OTHER REGULATORS AND WITH ELECTED OFFICIALS ON THESE TOPICS.
4 WE HAVE SEEN THE LETTER TO SENATOR WARREN, FOR EXAMPLE. WE
5 THINK THERE IS REASON TO BELIEVE THAT THERE HAVE BEEN OTHER
6 COMMUNICATIONS BETWEEN THE SEC AND OTHER AGENCIES AND ELECTED
7 OFFICIALS. AND, AGAIN, THOSE WOULD NOT BE SUBJECT TO THE SAME
8 DELIBERATIVE PROCESS PRIVILEGE QUESTIONS AS SOMETHING THAT
9 WOULD BE PURELY INTERNAL WITHIN THE SEC

10 AND THEN I THINK THE THIRD CATEGORY, YOU KNOW, ULTIMATELY
11 WE DO THINK THAT THERE MAY BE AT LEAST SOME SUBSET OF THE SEC'S
12 INTERNAL COMMUNICATIONS THAT COULD BE SUBJECT TO DISCOVERY AND
13 THAT COULD CORROBORATE KRAKEN'S ARGUMENTS. THAT'S AN ISSUE
14 THAT I THINK WE'D LIKE TO HAVE AN OPPORTUNITY TO BRIEF LATER
15 DOWN THE LINE AND TO EXPLAIN SORT OF WHY -- WHETHER THERE IS AT
16 LEAST SOME CATEGORY OF DOCUMENTS THAT ARE OUTSIDE THE
17 DELIBERATIVE -- THE SORT OF ARC OF DELIBERATIVE PROCESS
18 PRIVILEGE THAT YOUR HONOR HAS EXPRESSED CONCERNS ABOUT.

19 SO THOSE ARE SORT OF A FEW -- THAT'S A PREVIEW OF SORT OF
20 WHAT THE MORE WOULD BE BEYOND -- OBVIOUSLY THERE IS ALREADY,
21 THERE IS A SOMEWHAT DEVELOPED RECORD AS TO WHAT THE SEC PUBLIC
22 STATEMENTS HAVE BEEN ON THESE TOPICS, BUT THERE ARE OTHER
23 DOCUMENTS THAT WOULD BE RELEVANT TO THESE QUESTIONS.

24 THE COURT: SO ARE YOU HYPOTHESIZING THAT THE SEC
25 MADE DETERMINATIONS WITH RESPECT TO YOUR COMPETITORS, KRAKEN'S

1 COMPETITORS THAT ARE INCONSISTENT WITH WHAT IT HAS DONE WITH
2 YOU?

3 MR. LEVANDER: THAT IS -- THAT IS POSSIBLE.

4 BUT, I MEAN -- BUT I THINK MAYBE A MORE -- AN EVEN MORE
5 SORT OF CORE QUESTION MIGHT BE, HAD THE SEC COMMUNICATED TO
6 KRAKEN'S COMPETITORS THAT THERE WAS NO PATH FOR REGISTRATION,
7 RIGHT? OR THAT THERE WAS NO CLARITY ON THE QUESTIONS OF HOW
8 THE SECURITIES LAWS APPLIED TO SECONDARY MARKET DIGITAL ASSET
9 TRADING PLATFORMS.

10 THOSE WOULD BE VERY IMPORTANT STATEMENTS FOR PURPOSES OF
11 THIS CASE, FOR PURPOSES OF THE FAIR NOTICE DEFENSE, AND THERE'S
12 REASON TO BELIEVE THAT AT LEAST THE SEC WAS HAVING
13 CONVERSATIONS WITH, WITH FOLKS IN THIS -- IN THIS INDUSTRY SUCH
14 THAT THOSE SORTS OF DOCUMENTS MAY BE OUT THERE FOR DISCOVERY.

15 THE COURT: SO WOULD YOU CONNECT THE DOTS FOR ME WITH
16 RESPECT TO COMMUNICATIONS THAT THE SEC HAD WITH YOUR CLIENT?
17 DID THEY -- DID IT HAVE NO COMMUNICATIONS ON THAT TOPIC? DID
18 IT HAVE COMMUNICATIONS THAT ARE DIFFERENT? WHAT'S THE -- WHY
19 DO I CARE ABOUT WHAT THE SEC MAY HAVE SAID TO OTHER PEOPLE?
20 WHY DON'T I CARE ABOUT WHAT IT HAS SAID TO YOU OR WHAT IT SAID
21 MORE BROADLY PUBLICLY?

22 MR. LEVANDER: SURE. SO THERE ARE A FEW DIFFERENT
23 PIECES UNDER, UNDER THE FAIR NOTICE ARGUMENTS THAT THIS COULD
24 BE RELEVANT TO.

25 SO ONE IS THE SECOND CIRCUIT'S DECISION IN UPTON. THE

1 COURT THERE HELD THAT THERE WAS A MERITORIOUS FAIR NOTICE
2 DEFENSE AND THAT THERE HAD BEEN NO FAIR NOTICE WHEN A REGULATOR
3 MAKES A SUBSTANTIAL CHANGE IN ITS ENFORCEMENT POLICY THAT IS
4 NOT COMMUNICATED TO THE PUBLIC.

5 SO THOSE DOCUMENTS ARE RELEVANT TO SORT OF LIKE THE DELTA
6 THERE, RIGHT, FROM SAYING THERE IS A CHANGE IN ENFORCEMENT
7 POLICY, BUT IT IS NOT BEING COMMUNICATED TO, FOR EXAMPLE,
8 KRAKEN. MAYBE IT IS BEING COMMUNICATED TO OTHERS, BUT IT'S NOT
9 BEING COMMUNICATED TO KRAKEN.

10 AND THEN THERE'S ALSO -- I THINK THERE MAY ALSO BE AN
11 ISSUE -- AND THIS IS FROM THE WESTERN INTERNATIONAL SECURITIES
12 CASE WHICH WE CITE THROUGHOUT OUR PAPERS. THAT'S A RECENT
13 DECISION FROM THE CENTRAL DISTRICT OF CALIFORNIA WHERE THE
14 COURT DENIED THE SEC'S MOTION TO STRIKE A FAIR NOTICE DEFENSE,
15 AND THERE THE COURT SAID THAT THE FAIR NOTICE QUESTION MAY
16 DEPEND IN PART ON WHETHER THE REGULATOR HAS TAKEN INCONSISTENT
17 POSITIONS.

18 SO IF THE REGULATOR OF THE SEC -- THERE THE SEC, TOO -- IS
19 COMMUNICATING DIFFERENT THINGS TO DIFFERENT FOLKS SUCH THAT
20 THERE WAS NOT FAIR NOTICE PROVIDED TO THE MARKET, THAT WOULD BE
21 RELEVANT TO THE FAIR NOTICE QUESTIONS BEFORE YOUR HONOR.

22 THE COURT: MR. MOORES, WHY DON'T YOU PICK IT UP FROM
23 THERE.

24 MR. MOORES: THANK YOU VERY MUCH, YOUR HONOR.

25 I THINK WHAT YOU'RE SEEING FROM DEFENSE COUNSEL AT THIS

1 POINT IS A PREVIEW OF THE CONTINUOUS ARGUMENTS THAT YOU'RE
2 GOING TO SEE REPEATEDLY ABOUT DISCOVERY GOING FORWARD IF THESE
3 DEFENSES ARE ALLOWED IN.

4 AND THEY ARE -- I BELIEVE, AS YOU HAVE NOTED AT THE
5 BEGINNING, YOUR HONOR, I AGREE WITH YOU THAT, YOU KNOW,
6 INTERNAL INFORMATION AND ANY INFORMATION THAT IS NOT ALREADY IN
7 THE PUBLIC REALM IS DEFINITELY IRRELEVANT, AND EVEN TO THAT
8 INFORMATION IN THE PUBLIC REALM, I CAN GO INTO WHY THAT'S
9 IRRELEVANT AS WELL.

10 BUT MORE IMPORTANTLY, I THINK, YOUR HONOR, JUST TO SORT OF
11 ADDRESS -- I THINK WHAT YOU'RE SAYING IS THAT MOTION FOR
12 JUDGMENT ON THE PLEADINGS 12(C) IS NOT APPROPRIATE FOR A --
13 SORRY -- VOID FOR VAGUENESS OR A FAIR NOTICE DEFENSE, AND I
14 WOULD OFFER YOU, YOUR HONOR, THAT IS ACTUALLY QUITE APPROPRIATE
15 IN TERMS OF OTHER COURTS HAVE ACTUALLY, ON 12(C) MOTIONS,
16 DISMISSED AFFIRMATIVE DEFENSES, MOST RECENTLY IN THIS DISTRICT
17 IN CFTC VERSUS LENDING -- EXCUSE ME, SORRY -- LENDING CLUB
18 CORP. -- SORRY -- FTC VERSUS LENDING CORP. CLUB.

19 AND THE REASON FOR THAT, YOUR HONOR, IS ACTUALLY I THINK
20 IMPORTANT THAT THE NINTH CIRCUIT JUST SAID RECENTLY IN
21 MATSUMOTO VERSUS LABRADOR THAT THE FAIR NOTICE DEFENSE, IF
22 THERE'S AN IMPRECISE BUT COMPREHENSIVE -- COMPREHENSIBLE
23 NORMATIVE STANDARD, THAT'S ENOUGH FOR FAIR NOTICE.

24 AND WHAT WE HAVE HERE IS WE HAVE A CHALLENGE IN SAYING
25 THAT A STATUTE, YOU KNOW, THE SECURITIES LAWS, THE TERM

1 SECURITY AND INVESTMENT CONTRACTS ARE TOO VOID, THEY'RE
2 UNCONSTITUTIONALLY VOID, AND THE ANALYSIS, AS MATSUMOTO SAID,
3 IS IN DETERMINING VAGUENESS, WE LOOK TO THE WORDS OF THE
4 STATUTE.

5 SO ANY OF THE INFORMATION THAT MR. LEVANDER WAS PROPOSING
6 BE DISCOVERED IS NOT RELEVANT TO THE COURT'S ULTIMATE ANALYSIS
7 HERE. THE COURT COULD CONDUCT THAT ANALYSIS TODAY JUST THE
8 SAME AS IT WOULD CONDUCT THE ANALYSIS IN THE FUTURE, EITHER AT
9 SUMMARY JUDGMENT OR EVEN LATER ON IN THE CASE.

10 WHAT THE COURT WOULD BE DOING IS LOOKING TO THE TERMS OF
11 THE STATUTE, DETERMINING WHETHER OR NOT, THROUGH THE JUDICIAL
12 GLOSS AND CONSTRUCTION, WHETHER OR NOT THEY ARE VAGUE OR NOT.

13 AND HERE THE HOWEY TEST IS THAT COMPREHENSIBLE, NORMATIVE
14 STANDARD. AND AS DEFENDANT KRAKEN HAS ALREADY CONCEDED TO,
15 THAT IT HAS FAIR NOTICE THAT THE HOWEY TEST APPLIED.

16 AND IT SAID EARLIER IN ITS MOTION TO DISMISS THAT THE
17 HOWEY -- THE PLAIN LANGUAGE OF THE STATUTE WAS CLEAR, THAT
18 HOWEY WAS CLEAR, AND TODAY, UNFORTUNATELY, IT IS ARGUING THE
19 OPPOSITE. IT IS SAYING THAT IT'S UNCONSTITUTIONALLY VAGUE.

20 AND I THINK THAT THE COURT CAN ANALYZE THAT TODAY JUST AS
21 WELL AS IT CAN ANALYZE IT LATER ON.

22 I KNOW DEFENDANTS MADE THE ARGUMENT IN TRYING TO
23 DISTINGUISH THE LONG LIST OF CASES THAT HAVE FOUND THAT THE
24 TERMS INVESTMENT CONTRACT AND SECURITIES ARE NOT
25 UNCONSTITUTIONALLY OR IMPERMISSIBLY VAGUE BY SAYING THOSE DID

1 NOT OCCUR SORT OF AT A 12(C) MOTION.

2 THAT MIGHT BE THE CASE WITH RESPECT TO A LOT OF THESE
3 DECISIONS. THEY WERE EITHER ON A MOTION TO DISMISS, SUMMARY
4 JUDGMENT.

5 HOWEVER, IF YOU LOOK AT THE COURT'S ANALYSIS -- AND KRAKEN
6 DOES NOT ATTACK OR UNDERMINE THE ACTUAL ANALYSIS IN THOSE
7 DECISIONS. BUT THEY DON'T RELY UPON ANY SORT OF FACTUAL
8 DEVELOPMENT. IN LBRY, IN KIK, IN KEENER, THEY'RE ALL DONE
9 BASED UPON ANALYZING THE LAW AND DETERMINING WHETHER OR NOT THE
10 TERMS ARE UNCONSTITUTIONALLY VAGUE.

11 AND I BELIEVE THE COURT CAN DO THAT ANALYSIS NOW AND SAVE
12 ITSELF AND SAVE THE PARTIES FROM, AGAIN, THIS REPEATED REQUEST
13 FOR IRRELEVANT AND RUMMAGING AROUND IN THE SEC'S INTERNAL
14 FILES.

15 AS MR. LEVANDER SAID --

16 THE COURT: I THINK MR. LEVANDER HAS DISAVOWED ANY
17 DESIRE TO RUMMAGE AROUND IN YOUR FILES.

18 MR. MOORES: WELL, HE DID SAY THAT THEY WERE -- THERE
19 WAS AT LEAST ONE CATEGORY OF DOCUMENTS THAT WERE INTERNAL TO
20 THE SEC THAT THEY WANTED TO REQUEST SPECIFICALLY, EVEN DURING
21 HIS ORAL ARGUMENTS.

22 AND WITH RESPECT TO THEIR DOCUMENT REQUESTS AND THEIR
23 REQUESTS FOR ADMISSIONS, THEY'RE ALL STREWN ABOUT WITH REQUESTS
24 FOR INTERNAL SEC DOCUMENTATION AND INTERNAL SEC BELIEFS.

25 AND EVEN WHEN MR. LEVANDER IS ASKING THE COURT TO GRANT

1 DISCOVERY OF EXTERNAL COMMUNICATIONS WITH THIRD PARTIES, I
2 THINK THE COURT NEEDS TO TAKE COGNIZANCE OF THAT IT'S AN
3 OBJECTIVE TEST. THE HOWEY TEST IS AN OBJECTIVE TEST. AND THE
4 FAIR NOTICE TEST IS AGAIN AN OBJECTIVE TEST.

5 AND SO IT IS NOT WHAT WAS COMMUNICATED SPECIFICALLY
6 PRIVATELY TO ONE PARTY OR ANOTHER PARTY. WHAT MATTERS IS, YOU
7 KNOW, THE OBJECTIVE ORDINARY PERSON, OR IN THIS CASE IF WE'RE
8 DOING AS APPLIED, THE ORDINARY CRYPTO ASSET TRADING PLATFORM
9 OPERATOR, NOT ANY PARTICULAR -- YOU KNOW, IT'S NOT TRYING TO
10 LOOK AT THE SUBJECTIVE UNDERSTANDING OF ANY PARTICULAR PERSON.

11 THOSE COMMUNICATIONS WITH EXTERNAL PARTIES ARE IRRELEVANT
12 TO WHETHER OR NOT AN ORDINARY PERSON HAD, YOU KNOW, AN
13 UNDERSTANDING OF WHAT CONDUCT IS PROHIBITED, WHICH IS THE ONLY
14 THING THAT'S REQUIRED UNDER FAIR NOTICE UNDER THE LAW.

15 SO I WOULD SUGGEST, YOUR HONOR, STRONGLY THAT TODAY IS THE
16 DAY IN WHICH THE COURT HAS ALL THE INFORMATION.

17 MR. LEVANDER HAD MENTIONED THAT THERE ARE SOME FACTUAL
18 DISPUTES. THERE ARE NO REAL MATERIAL FACT DISPUTES IN THE
19 PLEADINGS. HE POINTS TO A COUPLE OF ITEMS, YOU KNOW,
20 SPECIFICALLY ABOUT WHAT WAS OR WHAT WAS NOT COMMUNICATED BY
21 CHAIR GENSLEER BACK IN 2021.

22 WHAT WAS COMMUNICATED IS NOT IN DISPUTE HERE IN THE
23 PLEADINGS. I KNOW THAT KRAKEN HAS ASKED THAT JUDICIAL NOTICE
24 BE TAKEN OF THE TRANSCRIPT OF IT. WE'RE NOT DISPUTING THE
25 TRANSCRIPT.

1 AND SO I THINK HE ALSO POINTED TO, AGAIN, SOME OTHER
2 COMMUNICATIONS THAT, AGAIN, DON'T GO TOWARD THE OBJECTIVE TEST.
3 BUT THERE ARE NO FACTUAL DISPUTES SITTING HERE TODAY.

4 AND I BELIEVE IT WAS OVER 700 PAGES OF DOCUMENTS THAT WERE
5 ATTACHED BY KRAKEN TO THE OPPOSITION TO THE 12(C) MOTION. IN
6 THEIR MOTION TO DISMISS, THEY ATTACHED OVER 1700 PAGES OF
7 EXHIBITS.

8 ALL OF THE INFORMATION THAT IS PUBLICLY AVAILABLE, KRAKEN
9 HAS FOUND.

10 AND, IN FACT, WHAT KRAKEN IS SUGGESTING IS THAT AN
11 ORDINARY PERSON WHO'S OPERATING A CRYPTO ASSET TRADING PLATFORM
12 IS SCOURING THE INTERNET EVERY DAY IN ORDER TO EVALUATE WHETHER
13 OR NOT, YOU KNOW, IT'S LOOKING AT THE HOWEY TEST.

14 AND THAT IN AND OF ITSELF IS AN ADMISSION THAT THEY HAD
15 FAIR NOTICE THAT THE HOWEY TEST APPLIED, AND THAT IS REALLY THE
16 COMPREHENSIBLE, NORMATIVE STANDARD THAT IS ENOUGH FOR FAIR
17 NOTICE. A SPECIFIC DESCRIPTION OF, YOU KNOW, OR WARNING IS NOT
18 REQUIRED UNDER FAIR NOTICE.

19 AND, IN FACT, YOU KNOW, I THINK ONE OF THE THINGS THAT WAS
20 ALSO IMPORTANT WAS THE SORT OF SHIFT IN THE FOCUS ON TO THE
21 STATEMENTS BY THE SEC, AND THE NINTH CIRCUIT HAS ALREADY SAID
22 THAT THAT'S NOT RELEVANT. IN FANG LIN AI VERSUS UNITED STATES,
23 THE QUESTION IS NOT WHETHER THE GOVERNMENT APPLIED OR
24 INTERPRETED THE STATUTE CONSISTENTLY OR INCONSISTENTLY. THAT
25 IS NOT RELEVANT TO WHETHER OR NOT THE STATUTE IS VOID FOR

1 VAGUENESS.

2 SO -- AND THAT WAS ALSO ADOPTED RECENTLY, OR IN 2016, IN
3 INTERIOR GLASS SYSTEMS, INC. VERSUS UNITED STATES. YOU KNOW, A
4 STATUTE NEED NOT FIND EVERY FACTUAL SCENARIO THAT FALLS WITHIN
5 ITS PURVIEW IN ORDER TO WITHSTAND A VAGUENESS CHALLENGE.

6 SO I THINK THAT WHAT DEFENDANTS ARE TRYING TO DO IS THE
7 STATUTE ITSELF IS CLEAR, THEY SAID IT WAS CLEAR; THEY HAVE
8 CONCEDED THAT THEY KNEW THAT THE HOWEY TEST APPLIED; THEY ARE
9 NOT CHALLENGING THIS COURT'S INTERPRETATION THAT THE HOWEY TEST
10 APPLIES IN SECONDARY MARKET SALES, JUST AS IT DOES EQUALLY IN
11 PRIMARY MARKET SALES; AND THEY'RE NOT CONTESTING THAT THE HOWEY
12 TEST DOES NOT REQUIRE CONTRACTS OR POST-SALE OBLIGATIONS.

13 THEY ESSENTIALLY UNDERSTAND THAT THEY HAD FAIR NOTICE, AND
14 THERE'S NO FACTS THAT WILL UNDERMINE THAT CONCLUSION EITHER
15 TODAY OR SIX MONTHS FROM NOW AFTER WE HAVE NUMEROUS FACTUAL
16 DISPUTES AND MOTIONS TO COMPEL BROUGHT, LIKE WHAT HAPPENED
17 ALREADY TO THE MAGISTRATE ONCE.

18 YOU ALREADY --

19 THE COURT: MR. MOORES --

20 MR. MOORES: SORRY. GO AHEAD, YOUR HONOR.

21 THE COURT: HOW DO YOU DISTINGUISH THE CENTRAL
22 DISTRICT DECISION THAT MR. LEVANDER WAS TALKING ABOUT?

23 MR. MOORES: SO, YOUR HONOR, ONE OF THE IMPORTANT
24 THINGS ON THAT VOID FOR VAGUENESS CHALLENGE WAS THAT THE COURT
25 FELT THAT IT DID -- THAT THERE WERE FACTUAL DISPUTES AND THAT

1 IT DID NOT HAVE A SUFFICIENT RECORD IN FRONT OF IT.

2 SPECIFICALLY, I BELIEVE THAT THE SEC -- FIRST OF ALL, IT WAS A
3 RULE, IT WAS REGULATION BEST INTEREST, REGULATION BI, THAT HAD
4 JUST BEEN PUT INTO EFFECT AND THAT THERE WAS GUIDANCE THAT WAS
5 PROVIDED BY THE SEC.

6 THE SEC, I BELIEVE IN ITS PAPERS, SAID THAT THE RULE
7 ITSELF, ALONG WITH THE GUIDANCE, PROVIDED FAIR NOTICE TO
8 DEFENDANTS.

9 THE COURT DID NOT EVEN HAVE THE ENTIRETY OF THE GUIDANCE,
10 AND PERHAPS DIDN'T HAVE ALL OF THE INFORMATION IN THE RECORD AT
11 THAT TIME IN THE PLEADINGS, AND SO THE COURT DID NOT BELIEVE
12 THAT IT COULD RULE ON THAT BECAUSE THERE WERE FACTUAL DISPUTES.

13 HERE THERE ARE NOT MATERIAL RELEVANT FACTUAL DISPUTES.
14 THERE'S SUFFICIENT INFORMATION IN THE PLEADINGS. THE
15 OPERATION -- AND SO THE FOCUS REALLY -- AND I KNOW KRAKEN HAD
16 MADE ISSUE OF THIS WITH ITS OPPOSITION. THE FACTS AT HAND IN
17 THE ANALYSIS, WHAT'S IMPORTANT IS THE DEFENDANT'S CONDUCT, AND
18 THERE'S NO FACTUAL DISPUTE AT ALL. WHEN MR. LEVANDER HAD
19 IDENTIFIED THE VARIOUS, QUOTE, FACTS IN DISPUTE, HE DIDN'T
20 MENTION A WORD ABOUT KRAKEN'S OPERATION, BECAUSE THOSE ARE
21 WHAT, A, ARE IMPORTANT AND RELEVANT TO THE AS APPLIED ANALYSIS;
22 AND, 2, THERE ARE NO FACTS IN DISPUTE.

23 IN OUR PAPERS, WE OUTLINE ALL OF THE FACTS ABOUT KRAKEN'S
24 OPERATIONS THAT ARE NOT IN DISPUTE. KRAKEN DOES NOT DISPUTE
25 THOSE IN ITS PAPERS, THAT THEY ARE AGREED TO OR THAT THEY

1 CONCEDED TO IN THE ANSWER.

2 AND, IN FACT, YOU DON'T NEED A LOT OF SPECIFIC FACTS FOR
3 THE ANALYSIS. THE FACT THAT KRAKEN IS A CRYPTO ASSET TRADING
4 PLATFORM OPERATOR AND IT HAS SORT OF MATCHING BIDS AND OFFERS
5 AND THE WAY IT OPERATES ITS PLATFORM, THAT'S ENOUGH FOR THE
6 ANALYSIS OF WHETHER OR NOT, YOU KNOW, A PERSON ESSENTIALLY
7 STANDING IN THEIR SHOES WOULD UNDERSTAND WHAT IS PROHIBITED, OR
8 WOULD UNDERSTAND, AS THE SUPREME COURT SAID, THAT ITS CONDUCT
9 IS AT RISK.

10 THE COURT: MR. LEVANDER, WHY DON'T YOU REPLY AND
11 WRAP THIS UP?

12 MR. LEVANDER: SURE.

13 SO JUST VERY QUICKLY ON THE WESTERN INTERNATIONAL, THE
14 REG BI CASE, SO THAT CASE DOES NOT TURN ON THE EXISTENCE OF
15 FACTUAL DISPUTES.

16 WHAT THE COURT SAID IN THAT CASE -- AND I'LL QUOTE IT --
17 IS THAT IN MOST CASES, INCLUDING THIS ONE, THE COURT LACKS
18 SUFFICIENT INFORMATION AT THE PLEADING STAGE TO CONCLUDE THAT
19 THIS INQUIRY ON FAIR NOTICE WILL IN ALL POSSIBLE SCENARIOS
20 RESOLVE IN FAVOR OF THE REGULATOR.

21 THAT'S A VERY BROAD DECISION, AND IT'S NOT AT ALL BASED ON
22 THE EXISTENCE OF FACT DISPUTES IN THAT CASE.

23 BUT MOREOVER, WHILE MR. MOORES TRIES TO PLAY DOWN THE FACT
24 DISPUTES IN THIS CASE, THERE ARE QUITE A NUMBER. IT IS NOT AT
25 ALL ACCURATE TO SAY THAT KRAKEN JUST UNDERSTOOD THAT IT HAD

1 FAIR NOTICE AND THAT THERE ARE NO UNDERLYING FACTUAL DISPUTES
2 THAT REMAIN IN THIS CASE.

3 THE FIRST ONE -- THE FIRST ONE, TO HIGHLIGHT, IS WHETHER,
4 WHETHER KRAKEN AND OTHERS HAD THE ABILITY TO REGISTER AT ALL AS
5 DIGITAL ASSET TRADING PLATFORMS. THAT IS A FUNDAMENTAL ISSUE
6 IN THIS CASE AND IT IS ONE THAT IS VERY MUCH IN DISPUTE.

7 AND THEN WHILE IT IS TRUE THAT CHAIR GENSLER -- THAT THE
8 SEC IS ACKNOWLEDGING THAT CHAIR GENSLER MADE THE STATEMENT, THE
9 ACTUAL CONTEXT AND THE IMPORT OF THAT STATEMENT IS VERY MUCH IN
10 DISPUTE IN THIS CASE.

11 I'D LIKE TO LIST A FEW MORE FACTUAL DISPUTES IF YOUR HONOR
12 HAS A MOMENT, AND THEN I THINK MR. SOLOMON HAS SOME VERY QUICK
13 CLOSING WORDS.

14 THE COURT: OKAY.

15 MR. LEVANDER: IS THAT OKAY IF WE PROCEED THAT WAY?

16 THE COURT: SURE.

17 MR. LEVANDER: SO, YEAH, JUST TO LIST A FEW OTHER
18 FACTUAL DISPUTES THAT STILL EXIST IN THIS CASE, ONE OTHER KEY
19 ASPECT OF THE FAIR NOTICE, OF THE FAIR NOTICE FACTS IS THE
20 SPEECH THAT WAS GIVEN BY THE THEN-HEAD OF CORPORATION FINANCE
21 AT THE SEC, BILL HINMAN, AND THERE WAS A REALLY IMPORTANT
22 FACTUAL QUESTION HERE ABOUT WHETHER THAT SPEECH WAS INTENDED TO
23 BE COMMISSION POLICY OR NOT.

24 THE SEC DISPUTES THAT THAT WAS -- THAT THAT WAS ACTUALLY
25 THE SEC'S POLICY ON THIS QUESTION, BUT OUR POSITION IS THAT

1 THAT SPEECH WAS ACTUALLY A CONCERTED EFFORT TO GIVE GUIDANCE TO
2 THE MARKETPLACE.

3 AND THEN THERE'S A QUESTION ABOUT WHETHER -- THIS IS
4 ASSERTED IN THE PAPERS ON THIS MOTION -- ABOUT WHETHER KRAKEN
5 DELIBERATELY FAILED TO REGISTER, SORT OF HAD THE INTENTION TO
6 AND THEN JUST CHOSE NOT TO.

7 OUR POSITION, AND THE SEC DISPUTES THIS, IS THAT KRAKEN
8 TRIED TO REGISTER, BUT THERE WAS NO REGIME AVAILABLE FOR US TO
9 DO SO, AND THAT'S ALLEGED -- THAT'S ALLEGED IN THE FIRST
10 PARAGRAPH OF OUR ANSWER WHICH, AGAIN, AT THIS STAGE AND ON THIS
11 MOTION, THE COURT NEEDS TO ACCEPT THOSE PLEADED FACTS AS TRUE,
12 AND THOSE ARE FACTS THAT THE SEC DISPUTES IN THIS CASE.

13 AND THEN FINALLY -- THIS IS JUST TO TIE INTO WHAT WE WERE
14 TALKING ABOUT BEFORE IN TERMS OF WHAT ADDITIONAL, WHAT
15 ADDITIONAL FACTS MIGHT BE RELEVANT BEYOND WHAT'S OUT IN THE
16 PUBLIC, THERE'S A FACTUAL QUESTION, WHICH I THINK THE SEC
17 DISPUTES, AROUND WHETHER ITS COMMUNICATIONS TO THIRD PARTIES
18 ACTUALLY DID PAINT A CLEAR PICTURE OF ITS REGULATORY APPROACH
19 OR ACTUALLY ADDED TO THE UNCERTAINTY WHICH COURTS ACROSS THE
20 COUNTRY HAVE OBSERVED THE SEC HAS CREATED IN THIS INDUSTRY.

21 SO WITH THOSE, I THINK THAT'S A -- I COULD GO ON AND LIST
22 A NUMBER OF OTHER DISPUTED FACTS IN THIS CASE, BUT THERE ARE
23 KEY DISPUTED FACTS THAT REMAIN HERE ON THESE QUESTIONS AND THAT
24 SHOULD -- AND THAT KRAKEN SHOULD HAVE AN OPPORTUNITY TO LOOK AT
25 IN DISCOVERY.

1 NOW I'LL LET MR. SOLOMON FINISH IF YOUR HONOR WILL ALLOW
2 IT.

3 THE COURT: ALL RIGHT.

4 MR. SOLOMON, GO AHEAD.

5 MR. SOLOMON: THANKS FOR YOUR INDULGENCE, YOUR HONOR.

6 THE SEC IS ASKING YOU TO DO SOMETHING EXTRAORDINARY HERE,
7 BASICALLY CUT OFF DISCOVERY AT THE KNEES AT THE PLEADING STAGE
8 FOR A FAIR NOTICE DEFENSE. NO COURT HAS EVER DONE THAT AT THE
9 PLEADING STAGE, NONE, NOT IN THE DIGITAL ASSET CONTEXT OR ANY
10 OTHER CONTEXT, NOT AT THE PLEADING STAGE, AND FOR GOOD REASON.

11 WE SHOULD BE ABLE TO GO TO THE MAGISTRATE JUDGE, WHO YOUR
12 HONOR HAS ALREADY TURNED TO, TO MAKE ARGUMENTS ABOUT DISCOVERY
13 IN RELATION TO FAIR NOTICE AND, RESPECTFULLY, WE BELIEVE ALSO
14 IN RELATION TO MAJOR QUESTIONS.

15 IT IS AN OBJECTIVE STANDARD, AS THE SEC CONCEDES, AND THE
16 SEC'S CONDUCT IS RELEVANT. AND COURTS ARE FAIRLY UNIFORM ON
17 THAT, INCLUDING SOME OF THE CASES THE SEC ITSELF CITES, SUCH AS
18 THE TERRAFORM CASE WHERE JUDGE RAKOFF SQUARELY SAID THE SEC'S
19 CONDUCT CAN BE RELEVANT TO FAIR NOTICE.

20 THIS IS NOT JUST A QUESTION OF LOOKING AT THE DOCUMENTS WE
21 HAVE CHOSEN TO PUT FORWARD AT THIS PLEADING STAGE AND MAKING A
22 FACTUAL DETERMINATION ON THAT.

23 THERE ARE MANY OTHER PUBLIC DOCUMENTS WE WILL PUT IN FRONT
24 OF YOUR HONOR AT THE SUMMARY JUDGMENT STAGE, OR PERHAPS AT
25 TRIAL, AND WE BELIEVE, AND WE HAVE GOOD REASON TO BELIEVE FROM

1 DISCOVERY IN OTHER CASES, THAT THERE IS INTERNAL DOCUMENTATION,
2 AND CERTAINLY DOCUMENTATION REFLECTING COMMUNICATIONS BETWEEN
3 THE SEC AND THIRD PARTIES THAT BEAR DIRECTLY ON WHETHER OR NOT
4 THE LAW WAS CLEAR WITH RESPECT TO THE APPLICATION OF HOWEY TO
5 SECONDARY MARKET PLATFORMS.

6 AND IN FACT, JUST YESTERDAY, AS WE CALLED YOUR HONOR'S
7 ATTENTION TO, JUDGE FAILLA, WHO HAD RULED FOR THE SEC ON A
8 MOTION TO DISMISS UNIFORMLY NOW HAS CERTIFIED FOR APPEAL THAT
9 ORDER BROADLY, AND SHE COMMENTED ON PAGE 33 THAT PART OF THE
10 REASON SHE DID THAT WAS BECAUSE, YES, THERE'S CASE LAW ON THE
11 APPLICATION OF HOWEY GENERALLY, BUT THERE'S ALMOST NOTHING ON
12 THE APPLICATION OF HOWEY TO DIGITAL ASSETS.

13 WE ARE ENTITLED TO AT LEAST SEEK DISCOVERY, ASK FOR
14 DISCOVERY, AND THE SEC CAN RESIST THAT, BUT TO -- BUT WE
15 BELIEVE THAT YOUR HONOR SHOULD NOT, AT THIS EARLY PLEADING
16 STAGE, AS NO COURT HAS EVER DONE, AGAIN, CUT OFF OUR ABILITY
17 EVEN TO REQUEST THOSE DOCUMENTS.

18 AND JUST, YOUR HONOR, ON RIPPLE, TO BE PERFECTLY CLEAR,
19 BECAUSE THE SEC SPENDS TIME TALKING ABOUT THIS CASE,
20 JUDGE TORRES DETERMINED THAT THE FAIR NOTICE DEFENSE WAS
21 UNAVAILABLE AFTER SUMMARY JUDGMENT, AFTER SUMMARY JUDGMENT,
22 ONLY FOR INSTITUTIONAL SALES THAT RIPPLE MADE TO OTHER PARTIES
23 WITH CONTRACTS.

24 WITH RESPECT TO RIPPLE'S SALES ON PLATFORMS, RIPPLE'S
25 SALES ON PLATFORMS LIKE KRAKEN, THE COURT EXPRESSLY SAID SHE IS

1 NOT RULING THAT DUE PROCESS CANNOT BE A DEFENSE IN THAT
2 CONTEXT, AND SHE NOTED THAT THE SEC'S CASES MAY NOT BE -- MAY
3 NOT HAVE GIVEN SUFFICIENT NOTICE TO A SECONDARY MARKET PLATFORM
4 THAT THE LAW APPLIED IN THAT FASHION.

5 AND, IN FACT, WHEN THE SEC MOVED FOR -- THE SEC MOVED FOR
6 INTERLOCUTORY APPEAL BECAUSE THEY SUBSTANTIALLY LOST THE RIPPLE
7 CASE, AND THE JUDGE, IN DENYING THE INTERLOCUTORY APPEAL, IN A
8 FOOTNOTE SAID, "IF THIS CASE COMES BACK TO ME AFTER DIRECT
9 APPEAL, I WILL CONSIDER THE FAIR USE DEFENSE AS TO PROTOMATIC
10 SALES."

11 SO THAT DEFENSE WAS PRESERVED IN RIPPLE FOR THE VERY
12 REASONS WE THINK YOUR HONOR AT THIS EARLIER STAGE SHOULD
13 PRESERVE THAT DEFENSE.

14 THE SAME WAS TRUE IN WESTERN INTERNATIONAL.

15 AND, AGAIN, NO COURT HAS EVER AT THE PLEADING STAGE
16 ELIMINATED THE AFFIRMATIVE DEFENSE.

17 YOUR HONOR ALREADY APPOINTED A MAGISTRATE JUDGE WHO IS
18 PERFECTLY CAPABLE OF HEARING THE SEC'S ARGUMENTS --

19 THE COURT: YOU'RE NOW REPEATING YOURSELF. THANK
20 YOU, MR. SOLOMON.

21 MR. MOORES, DO YOU WANT TO RESPOND? I WILL GIVE YOU THE
22 LAST WORD INSTEAD.

23 MR. MOORES: THANK YOU, YOUR HONOR. I'D JUST LIKE TO
24 RESPOND TO A COUPLE THINGS THAT MR. SOLOMON SAID.

25 FIRST AND FOREMOST, WITH RESPECT TO THE COINBASE ORDER ON

1 THE INTERLOCUTORY APPEAL, WHAT JUDGE FAILLA DID SAY WAS THAT
2 HOWEY WAS CLEAR, THAT THERE SHOULD BE NO APPEAL OF WHETHER OR
3 NOT HOWEY INVOLVED CONTRACTS, FORMAL CONTRACTS, OR POST-SALE
4 OBLIGATIONS.

5 SO THE ACTUAL STATUTES IN HOWEY ARE NOT VAGUE. THEY ARE
6 CRYSTAL CLEAR IN JUDGE FAILLA'S OPINION IN THAT, AND THAT
7 SHOULD NOT BE SOMETHING THAT GOES UP TO THE SECOND CIRCUIT.

8 NOW, ONE OTHER THING. MR. LEVANDER BRINGS UP ALL OF
9 THESE, QUOTE, FACTUAL DISPUTES, BUT IT'S NOT SOMETHING THAT'S
10 IN THE PLEADINGS THAT WE DISPUTE ANY OF THESE THINGS THAT HE'S
11 MENTIONING.

12 BUT UNDERLYING ALL OF IT IS THAT WHEN HE TALKED ABOUT, YOU
13 KNOW, WHETHER OR NOT THERE'S A PATHWAY TO REGISTER AT ALL, THIS
14 IS INFORMATION THAT IS NOT RELEVANT TO WHETHER OR NOT THE
15 STATUTE ITSELF IS VAGUE. IT'S ALL IRRELEVANT AND IMMATERIAL.

16 AND SO I WOULD ASK THE COURT TO LOOK AT THE ANALYSIS AND
17 WHETHER OR NOT IT CAN CONDUCT THAT TODAY, AND I BELIEVE IT
18 SHOULD ANSWER THE QUESTION YES.

19 AND THEN IF IT ANSWERS IT NO, THE COURT SHOULD, AS IT SAID
20 AT THE BEGINNING, NOT ALLOW DISCOVERY ON THE FAIR NOTICE AND
21 VOID FOR VAGUENESS.

22 WHAT KRAKEN HAS AVAILABLE TO ITSELF WAS THE SAME THING
23 THAT WOULD BE AVAILABLE TO THE OBJECTIVE CRYPTO ASSET TRADING
24 PLATFORM OPERATOR, WHICH IS THE INFORMATION IN THE PUBLIC
25 DOMAIN.

1 THANK YOU, YOUR HONOR.

2 AND I'M HAPPY TO ANSWER ANY QUESTIONS YOU HAVE, BUT THANK
3 YOU FOR LISTENING TO US AND HEARING OUR MOTION TODAY.

4 THE COURT: ALL RIGHT.

5 WELL, THANK YOU ALL FOR YOUR ARGUMENT. I WILL DIVE BACK
6 INTO ALL OF THIS AND GET AN ORDER OUT AS SOON AS I CAN. THANKS
7 A LOT.

8 MR. MOORES: THANK YOU, YOUR HONOR.

9 MR. LEVANDER: THANK YOU, YOUR HONOR.

10 MR. SOLOMON: THANK YOU, YOUR HONOR.

11 THE CLERK: AND THAT CONCLUDES OUR CALENDAR THIS
12 AFTERNOON. THANK YOU ALL.

13 (THE PROCEEDINGS WERE CONCLUDED AT 2:39 P.M.)

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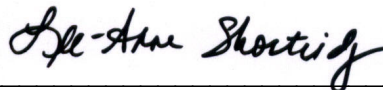
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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS A CORRECT TRANSCRIPT FROM THE RECORD OF ZOOM PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.



LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

DATED: JANUARY 17, 2025